(3)

No. 91-1626

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STEVEDORING SERVICES OF AMERICA, INC.,
formerly Seattle Stevedore Company,
a California Corporation,
Petitioner,

v.

EDWARD M. EGGERT; JODI EGGERT, his wife; and
the marital community composed thereof,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL ASSOCIATION OF STEVEDORES, SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD., ALLIANCE OF AMERICAN INSURERS, SHIPBUILDERS COUNCIL OF AMERICA, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER, STEVEDORING SERVICES OF AMERICA, INC.

Pursuant to Rule 26 and Rule 37 of the Rules of the Supreme Court of the United States, the National Association of Stevedores, Shipbuilders Council of America, Inc., the Alliance of American Insurers, and Signal Mutual Indemnity Association, Ltd. move for leave to file the brief *amici curiae* in support of Petitioner, Stevedoring Services of America, Inc.

The National Association of Stevedores (NAS) is a not-for-profit tax exempt [26 U.S.C. § 501(c)(6)] trade

association organized under the laws of the District of Columbia whose 38 member companies are stevedore contractor/marine terminal operators doing business on all four of the nation's seacoasts, the states of Alaska and Hawaii, and the Commonwealth of Puerto Rico. With the exception of the Puerto Rico members every NAS member company employs longshore labor engaged in maritime employment subject to the Longshore and Harbor Workers' Compensation Act (LHWCA).

The Shipbuilders' Council of America (SCA) is a not-for-profit trade association whose member companies are shipbuilders, shiprepairers, and component manufactures located in all sections of the country. Collectively, the member companies constitute about 95 percent of the Nation's shipbuilding industrial mobilization base. Shipyard workers employed by SCA member companies are engaged in maritime employment subject to the LHWCA.

The Alliance of American Insurers is an association of insurance companies whose member companies write property and casualty insurance, including state workers' compensation and federal LHWCA insurance, employers' miscellaneous or general liability throughout the United States.

Signal Mutual Indemnity Association, Ltd. is a group self-insurance facility authorized by the Secretary of Labor to secure the benefits payable under the LHWCA on a non-profit and cost effective basis for selected employers over the long term.

Amici collectively are the vast majority of self-insured and insured employers subject to the LHWCA and insurance carriers or facilities which secure the compensation for such employers. All *amici* are concerned with on the job injuries sustained by employees engaged in maritime employments subject to the LHWCA, the proper administration of the Act, and the prevention of fraud and abuse within the system.

Accordingly, *amici* respectively move for leave to file the attached brief *amici curiae* in support of respondents.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an employer compelled to pay benefits under the Longshore and Harbor Workers' Compensation Act is entitled to repayment of overpayments if it is successful on appeal.

2. Whether a claimant who obtains compensation benefits under the Longshore and Harbor Workers' Compensation Act through misrepresentation or fraud is entitled to keep payments wrongfully received.

3. Whether a claim for repayment of compensation wrongly paid under the Longshore and Harbor Workers' Compensation Act "arises under" that Act, so that federal subject matter jurisdiction exists.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The interest of *amici curiae* in this matter is detailed in the accompanying motion for leave to file this brief in support of petitioners and in the interest of reducing burdens on this Court will not be restated and are incorporated herein.

SUMMARY OF ARGUMENT

Contrary to the decision of the court below, Congress *did* intend that employers subject to the federal Longshore and Harbor Workers' Compensation Act (the LHWCA) 33 U.S.C. § 901 *et seq.* do have a federal right of action to recover payments made because of fraud or material misrepresentation. Employers have express statutory rights which arise from the LHWCA itself, Title 18 of the U.S. Code, and federal common law.

ARGUMENT

I. THE PROCEEDINGS BELOW

Amici respectfully urge this Court to grant the petition for writ of certiorari filed by petitioner, Stevedoring Services of America, Inc., for all of the reasons presented in the petition and for the additional reasons submitted by *Amici.*

The questions presented for review as stated by the petitioner are (1) Whether an employer compelled to pay benefits under the Longshore and Harbor Workers' Compensation Act is entitled to repayment of overpayments if it is successful on appeal, (2) Whether a claimant who obtains benefits under the Longshore and Harbor Workers' Compensation Act through misrepresentation or fraud is entitled to keep payments wrongfully received, and (3) Whether a claim for repayment of compensation wrongly paid under the Longshore and Harbor Workers' Compensation Act "arises under" that Act, so that federal subject matter jurisdiction exists.

The Court below, after reviewing §§ 908(j), 914(j) and 922 of the Act (33 U.S.C. § 908(j), 914(j) and 922) answered the third question in the negative, reversed the district court and declined to answer the first two questions. In doing so, the court below noted section 931 without discussion, and stated: (Pet. Brief, page 12(a)

> "In conclusion, taken together, these three provisions convince us that Congress did not intend to permit an employer a federal cause of action against a claimant for repayment of alleged overpayments of compensation. Although Congress did not expressly preclude an employer action for repayment, its intent on this issue is understood by the express provisions we have examined. The district court erred in holding that Stevedoring had an implied remedy under the LHWCA."

Amici submit that the court below was wrong, as was the Court of Appeals for the Fifth Circuit in its March 27, 1992 decision in *Ceres Gulf, Inc. v. Cooper*, No. 91-2097, —— F.2d —— (5th Cir. 1992) and that the issues presented must be reviewed and resolved by the Court.

II. THE EXTENT OF THE PROBLEM

Nationally, workers' compensation costs total more than $60 billion per year and are rising rapidly, according to an estimate by Tillinghast. One reason for increasing costs is that the system is rife with fraud, including systemic fraud in many areas of the country. Fraud is such a severe problem that the insurance industry has set up an anti-fraud division within the National Council on Compensation Insurance (Workers' Compensation Report, Bureau of National Affairs, 12/25/90, 11/25/91). There is no reason to believe that fraud is any less prevalent under the Longshore and Harbor Workers' Compensation Act than under the various state acts.

LHWCA costs, while a relatively small portion of this total, represent a very large percentage of the payroll of employers subject to the Act, even exceeding 50% in some ports. According to data compiled by the U.S. Department of Labor,[1] the total cost of operating the

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[1] Longshore and Harbor Workers' Compensation Act, Annual Report on Administration of the Act during Fiscal year 1989, submitted to Congress 1990, U.S. Department of Labor.

LHWCA program during 1989 exceeded $521 million. Of this amount, employers paid out over $417 million in direct disability compensation and medical benefit payments to claimants, and were assessed some $89 million more to cover obligations under § 8(f) of the Act.

This Court's answer to petitioner's questions are of great concern to at least 365 insurance carriers and their insureds and the 380 self-insured employers authorized by the Secretary to secure compensation under the Act. *Amici* are amongst those entities, and so too are some federal or federally related entities because of the Non-Appropriated Fund Instrumentalities Act of 1952, 5 U.S.C. §§ 8171-8173, which provides that the LHWA applies to civilian employees of such entities.

III. THE STATUTORY REMEDIES

Congress has enacted two workers' compensation laws; the LHWCA and the Federal Employees Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.* Most other federal civilian employees must look to FECA for compensation for workplace injuries or deaths. FECA expressly authorizes federal agencies to deduct overpayments of compensation made because of an error of fact or law from "later payments to which the individual is entitled". (5 U.S.C. § 8129). In this respect FECA and the LHWCA are similar on the subject of reducing or terminating compensation of claimants still receiving payment at the time the determination is made that they are not or are no longer entitled to such payments.

The court below indicates that with respect to the LHWCA Congress only intended to permit carriers and self-insureds to have relief from a continuing fraud, but not from one that has been fulfilled (no future employer payments). *Amici* seriously doubt that the Congress had any such intention, but looking solely at the three sections of the LHWCA and the one section of FECA, one might find reason to accept that analysis. Until recently, how-

ever, that analysis was not tested by any employer under either statute.

But in 1982 Congress provided another statutory remedy for both the federal FECA employer and the LHWCA employers and their insurance carriers. It enacted the Victim and Witness Protection Act and provided statutory financial relief for victims of federal crime—court ordered restitution. (18 U.S.C. § 3663, formerly 3579). The federal employer, being also the federal prosecutor, quickly made use of the expressed route of recovery with respect to FECA fraud. [*U.S. v. DeRosa*, 783 F.2d 1401 (9th Cir. 1986), *cert. den.*, 447 U.S. 908, *U.S. v. Seay*, 718 F.2d 1279 (4th Cir. 1983), *cert. den.*, 467 U.S. 1226], Semiannual Report, Office of Inspector General, U.S. Department of Labor, October 1, 1988-March 31, 1989, pages 21, 22). The express federal route to redress is relatively straight. It is 18 U.S.C. § 1001 (fraudulent statements to an agency of the government with respect to a matter under agency jurisdiction) plus §§ 1341 or 1342 of Title 18 (using the mail to make such statements), and then the Victim and Witness Protection Act, which at 18 U.S.C. § 3663 (formerly 3579) provides for an order of restitution upon conviction of a violation of any section of Title 18.

The same route was made available by Congress for private LHWCA employers. Section 31 of the LHWCA expressly makes fraudulent statements or misrepresentations with respect to claims under the Act a federal crime. Such statements also violate 18 U.S.C. § 1001 because they are also fraudulent statements made to a federal agency with respect to a matter subject to its jurisdiction. In addition, use of the federal mail in transmitting such statements is a violation of 18 U.S.C. § 1341 or § 1342 and upon conviction the trail leads inexorably to the Victim and Witness Protection and Act and the opportunity for the employer-victim to obtain an order of restitution; i.e. total recovery of all wrongfully paid compensation.

IV. THE COMMON LAW REMEDY

Amici submit that the propriety and amount of LHWCA compensation and the recovery of overpayments or undeserved compensation are federal questions arising from federal law. *Amici* also submit that federal law expressly and impliedly contemplates the recovery of all payments caused or induced by fraud—fraud against the employer and fraud against the federal government.

The sections of the LHWCA cited by the court below specifically take care of the situation in which compensation is still being paid voluntarily or pursuant to an issued compensation order as required by the Act. Title 18 of the U.S. Code and § 931 of the LHWCA take care of the situation in which compensation is no longer being paid and there has been a criminal conviction. In the only remaining situation, no compensation being paid and no criminal conviction, the defrauded employer must have a federal common law right of recovery or the system fails, and the employer's obligation to secure compensation for legitimate claimants is adversely affected, *Bloomer v. Liberty Mutual Insurance Co.*, 455 U.S. 74 (1980).

Amici submit that Congress did not intend to leave the redress of an employer victimized by fraud or material misrepresentation made in connection with either federal workers' compensation law, FECA or LHWCA, depend solely upon the actions of the U.S. Attorney. Neither did Congress intend to leave employers without any civil remedy when the statutory review process of the LHWCA outdistances the schedule of compensation payments. In this case there is a federal wrong and it must be addressed under federal law in a federal court. The axiom, state and federal, that a party should not be allowed to profit from his own misdeeds or wrongs is so imbedded in our jurisprudence that a legislature need not specifically enact it into law. As to workers' compensation fraud Congress has expressed itself on every situation that

needed specific mention and left to federal common law the obvious redress for simple fraud and the recovery of monies paid under false pretenses or material representations.

CONCLUSION

The petition for writ of *certiorari* should be granted by this Court. The extent of the problem addressed by this case, at first blush, appears to be minor but actually extends to all employers and employees subject to the workers' compensation laws enacted by the Congress, LHWCA and FECA. The court below failed to review all of the pertinent provisions of law, and the questions presented can only be answered by this Court. We urge the Court to grant the petition and resolve the issue.

Respectfully submitted,

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